

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

11 UNITED STATES OF AMERICA,) 2:98-cr-00035-HDM-RJJ
12 Plaintiff,)
13 vs.) ORDER
14 BRETT ALLEN HUDSON,)
15 Defendant.)

16 Before the court is the defendant's motion for reduction of
17 sentence pursuant to 18 U.S.C. § 3582(c)(2) (#138). The government
18 has responded (#142), and the defendant has replied (#144).
19

20 Under § 3582(c)(2), the court may reduce a defendant's
21 sentence if the defendant "has been sentenced to a term of
22 imprisonment based on a sentencing range that has subsequently been
23 lowered by the Sentencing Commission . . . if such a reduction is
24 consistent with applicable policy statements issued by the
25 Sentencing Commission." Under United States Sentencing Guideline
26 ("U.S.S.G.") § 1B1.10(a)(2), a reduction in a defendant's term of
27 imprisonment under 18 U.S.C. § 3582(c)(2) is not authorized if the
28 amendment reducing the defendant's guidelines range is not

1 contained in U.S.S.G. § 1B1.10(c).

2 Defendant asserts that he is entitled to relief under
3 Amendments 552 and 709 of the Sentencing Guidelines. While neither
4 amendment is listed in U.S.S.G. § 1B1.10(c), defendant nevertheless
5 insists that both may be applied retroactively because they are
6 "clarifying" amendments. See U.S.S.G. 1B1.11(b) (2). For several
7 reasons, defendant's contentions are without merit.

8 Amendment 552, which took effect on November 1, 1997, modified
9 U.S.S.G. § 2B3.1. Before the amendment was passed, § 2B3.1
10 increased a robbery sentence by two levels "if an express threat of
11 death was made." See *United States v. Day*, 272 F.3d 216, 217 n.2
12 (3d Cir. 2011) (citing § 2B3.1(b) (2) (F)). Amendment 552 removed
13 the word *express*, "modified the accompanying Commentary to
14 acknowledge that either an explicit or implicit threat would
15 suffice, and slightly altered the Commentary language to explain
16 the provision's intent to raise the offense level in cases in which
17 the offender instills in a reasonable victim a fear of death."
18 *Day*, 272 F.3d at 217.

19 Whether Amendment 552 was a clarifying amendment and thus
20 retroactively applicable is unnecessary for this court to decide.
21 Amendment 552 was in effect at the time of defendant's sentencing
22 in September 1998. Thus, Amendment 552 could not have subsequently
23 lowered defendant's sentence because it impacted his sentence in
24 the first place. Moreover, even if the amendment had not been
25 applied, it did not change, much less lower, the range of
26 defendant's sentence. "The deletion of the word 'express' plainly
27 broadened the Guideline rather than narrowed it." *Day*, 272 F.3d at
28 218. If anything, Amendment 552 further confirmed that the two-

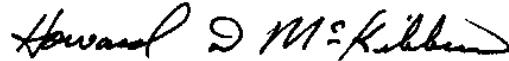
1 level enhancement for a threat of death was properly applied to
 2 defendant's sentence. As Amendment 552 did not subsequently lower
 3 defendant's sentence range, the amendment provides defendant no
 4 basis for relief.¹

5 The Ninth Circuit has explicitly held that Amendment 709 is a
 6 not a clarifying amendment and therefore may not be applied
 7 retroactively. *United States v. Marler*, 527 F.3d 874, 878 n.1 (9th
 8 cir. 2008). Defendant's assertion that Amendment 709 is a
 9 clarifying amendment and should be applied retroactively to reduce
 10 his sentence is thus without merit.²

11 Accordingly, defendant's motion for relief pursuant to 18
 12 U.S.C. § 3582 (#138) is **DENIED**.

13 **IT IS SO ORDERED.**

14 DATED: This 22nd day of August, 2011.

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17

 UNITED STATES DISTRICT JUDGE

18 ¹ It appears that what defendant is actually seeking here is a *de novo*
 19 review of the factual basis supporting application of the guideline
 20 Amendment 552 modified, § 2B3.1(b)(2)(F). This argument is implied by
 21 defendant's assertions that the government did not carry its burden in
 22 proving defendant had made a threat of death. (See Def. Mot. 4; Def. Reply
 23 3-4). His argument seems to be that Amendment 552 is a clarifying amendment
 24 and that because U.S.S.G. policy is to retroactively apply clarifying
 25 amendments, the court may reconsider whether the guideline provision
 26 Amendment 552 modified was properly applied in the first place. Defendant's
 27 position is without legal support, particularly where, as here, the
 28 enhancement would apply with or without the amendment.

29 ² Defendant has previously sought relief pursuant to Amendment 709.
 30 The court rejected his argument on the grounds that Amendment 709 did not
 31 change the calculation of defendant's sentence and at any rate was not
 32 retroactively applicable. Defendant appealed to the Ninth Circuit. On
 33 August 19, 2009, the Ninth Circuit issued an order denying defendant's
 34 application to proceed *in forma pauperis*, and requiring defendant to both
 35 pay the filing fee and show cause why the challenged judgment should not be
 36 summarily affirmed. After defendant failed to respond to the circuit
 37 court's order, his appeal was dismissed.